Congress of the United States
Washington, DC 20515

March 24, 2020

The Honorable Dr. Robert Kadlec
Assistant Secretary of Health and Human Services (Preparedness and Response)
U.S. Department of Health and Human Services
200 Independence Avenue, SW
Washington, DC 20201

Dear Assistant Secretary Kadlec,

We write to request information about actions taken by the Department Health and Human Services to prepare to implement the Defense Production Act (DPA; 50 U.S.C. §§4501 et seq.) in response to the Coronavirus Disease 2019 (COVID19). Despite the generosity of donors and the rapid engagement of private sector companies, it appears likely that only strong federal action through the Defense Production Act can ensure supplies and equipment are available in sufficient quantities. Swift government action is necessary to mitigate the worst possible outcomes of this pandemic.

As you know, there is a critical shortage of medical supplies, which will be the difference between life and death for countless Americans, and in particular healthcare providers. On March 21, the American Medical Association, American Hospital Association, and American Nurses Association called on the Administration to "immediately use the DPA to increase the domestic production of medical supplies and equipment that hospitals, health systems, physicians, nurses and all front-line providers so desperately need."[1] Every day that the President fails to fully operationalize manufacturing infrastructure to increase production of testing and diagnostic materials, personal protective equipment, and mechanical ventilators, we place our providers, and our patients, at increased and unnecessary risk.

[1] Letter to the White House from the AMA, AHA, and ANA, March 21, 2020, at: https://searchlf.ama-assn.org/undefined/documentDownload?uri=%2Funstructured%2Fbinary%2Fletter%2FLETTERS%2F2020-3-21-FINAL-AHA-AMA-ANA-Defense-Letter.pdf

The President has broad, unilateral authority under the Defense Production Act to order the production of medical supplies. Once invoked, these powers are delegated to the Secretary of Health and Human Services (HHS). The President invoked this authority on March 18; however, he has thus far failed to provide clear direction on his plans for operationalizing the DPA and for companies seeking to support production needs.[2] Nonetheless, it appears HHS has the discretion to use these authorities to ensure the provision of Personal Protective Equipment (PPE), ventilators, and other health resources through the Health Resources Priorities and Allocation System (HRPAS).[3] This system manages the flow of orders to private industry, the priority assigned to those orders, and ensures that items are delivered on time, at a fair price.

Unfortunately, it is our understanding that you have failed to finalize the implementing regulations for the HRPAS. The most recent Defense Production Act Committee Report to Congress (which you signed) states that "pursuant to E.O. 13603 section 201(b), HHS is currently drafting a final regulation to delegate HHS's authority to issue priority ratings pursuant to the DPA on orders and contracts for health resources."[4] In other words, HHS appears to lack finalized policies for situations where the Federal Emergency Management Agency or the Department of Veterans Affairs is the agency best situated to place a priority order. The report further states that "HHS plans for the regulation to address an HHS system for priority ratings, establish procedures for both HHS agencies and other federal agencies to request priority rating authorization, and establish a framework for HHS to consider and act on such requests." These appear to be fundamental policies, without which it will be very difficult for HHS to mount an effective response to medical supply shortages.

In order to gauge HHS preparedness to implement the Defense Production Act and determine the need for new legislation, we submit the following questions and request unclassified answers not later than Friday, March 27:

- What is the HHS system for priority ratings, and what procedures are in place for both HHS and other relevant federal agencies to request priority rating authorization?

- What policies exist for the acceptance and/or rejected of rated orders by HHS?

- What policies exist concerning age usage of rated orders?

- What policies exist to resolve conflicts between rated orders?

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[2] Executive Order on Prioritizing and Allocating Health and Medical Resources to Respond to the Spread of Covid-19, March 18, 2020, at: https://www.whitehouse.gov/presidential-actions/executive-order-prioritizing-allocating-health-medical-resources-respond-spread-covid-19/

[3] Federal Register, Vol. 80, No. 137, Friday, July 17, 2015, at: https://www.govinfo.gov/content/pkg/FR-2015-07-17/pdf/2015-17047.pdf

[4] The Defense Production Act Committee Report to Congress for Calendar Year 2018, June 24, 2019 at: https://www.fema.gov/media-library-data/1582898704576-dc44bbe61cce3cf763cc8a6b92617188/2018_DPAC_Report_to_Congress.pdf

- What policies exist regarding cancellation of rated orders?
- What limitations exist on the use or issuance of such orders?
- What policies exist to prevent waste, fraud, and abuse by vendors?

Please provide any relevant policies, whether in draft or final form. Thank you for your attention to this urgent matter, and we look forward to your expedited reply.

Very Truly Yours,

Katie Porter

Member of Congress

Abigail Spanberger

Member of Congress

Andy Levin

Member of Congress

Mikie Sherrill

Member of Congress